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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

Bruce A. Friedemann, *Petitioner*

v.

Terri McCormick, Guadalupe Gutierrez, Joan Gilbert, Lucy Brajevich, Kathleen Assar, Michael Engs, Joe Torro, Margret Sprague, J. Grahm Smart, Pima Community College District Board of Governors, *Respondents.*

On Petition for a Writ of Certiorari to the 9th Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Bruce A. Friedemann, *Pro Se*
POB 1417 • Tucson AZ 85702
520-882-7769

18 pp

QUESTION PRESENTED

In 42 U.S.C. § 1983/14th Amendment discrimination complaint, was summary judgment — denying straight-A nursing student (Friedemann) a jury trial — proper where solid, circumstantial evidence obtained through "discovery" or scientific research shows:

1. Malicious, incompetent teachers and staff flunked Friedemann for turning in a superb but heretical "process recording" (PR);

2. If not for the PR Friedemann would have received a B for Nursing 101;

3. The subjectively graded PR allows for arbitrary and capricious flunking of students the faculty dislikes;

4. Students hated Friedemann; teachers were afraid of Friedemann and thought he was mentally ill;

5. Friedemann was the first person *in ten years* who flunked Nursing 101 because of an "unsatisfactory" PR?

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PETITION FOR A WRIT OF CERTIORARI

Bruce A. Friedemann respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS/JUDGMENTS BELOW

The Order denying Friedemann's Petition for Rehearing, en banc was denied on November 17, 2000 (8a); Friedemann's Petition for Review (unpublished) was denied on July 13,

2000 (8a); Friedemann's "Motion for a Rehearing — To Amend Summary Judgment" was denied on September 27, 1999 (9a); Friedemann's Complaint was summarily dismissed on September 7, 1999 (9a).

JURISDICTION

This Court has jurisdiction under 28 USC § 1254(1). (En banc appeal review denied 11/17/00.)

CONSTITUTIONAL & STATUTORY PROVISIONS

42 USC § 1983: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper procedure for redress.

14th Amendment: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

THE FACTS OF THE CASE

Petitioner, Bruce A. Friedemann, was a straight-A student at Pima Community College (PCC) [D92-G1*].

In the Spring of 1996, Friedemann enrolled in NRS (Nursing) 101 at PCC (an 8-credit-hour course). Friedemann scored a final grade of "B" on all of the NRS 101 tests [D92-G3]; yet Friedemann received a final grade of "F" for NRS 101 [D92-G1]!

The ultimate reason, the defendants allege, for flunking Friedemann was one "unsatisfactory" process recording (PR)[1]. [D92-M1-¶2.0]. Friedemann alleges:

1. The PRs [D92-PR1 & PR2, included in EOR*] are genius level and show that Friedemann developed a "superb therapeutic alliance" with the client [D25,p2,last¶].
2. The PRs say, essentially, 2 + 2 = 4 — the defendants say 2 + 2 = 5 [D91,p2,¶1].
3. A jury (Friedemann asked for a jury) can see that Defendant McCormick, the teacher who flunked Friedemann, offered no legitimate, professional criticism of Friedemann's PRs [D92,pp2-3; D91,pp2-3; included in EOR].

The evidence that the PRs are "genius level, superb" is offered in Friedemann's **massive,** 147-page book entitled, "The Cure Yourself of Asthma Book." This book, that

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* D92 refers to Docket 92 of the trial court record. EOR = Court of Appeals Excerpts of Record.

[1] "The goal of writing a process recording is to help you consciously and deliberately utilize therapeutic techniques in communication which will assist you to effectively provide psychological comfort for your clients" (School syllabus, D92-PR5,p47,¶1; in EOR). The PR is supposed to be a transcript of a "3- to 5-minute segment of a conversation that you *feel is significant*" (Syllabus at page 48, italics in original). Most students make up fictitious conversations or embellish ones they had; then the student is to indicate what "therapeutic techniques" they used in the conversation and "evaluate the effectiveness of your responses" (Syllabus, ibid.).

Students are required to do two PRs; Friedemann's first PR was "satisfactory" [D92-PR3]. The PR accounts for only a tiny part of the NRS 101 grade: The unit exams, for which Friedemann received a "B" account for 70% of the grade; the skills lab, which Friedemann passed, is 10% and; clinical lab, for which the PR is only a tiny part of, is worth 20% [D92-G7]. Less than .5 percent of class-time is spent discussing PRs, yet with one "unsatisfactory" PR, a student can flunk the entire 8-credit-hour class [D25,p2,last¶]!

Friedemann edited, contains over 200 abstracts of scientific reports proving that the science in Friedemann's PRs is excellent. In addition to the abstracts, Friedemann's book has more than 20 full text reports from scientific journals . Two of the reports were written by nurses and one of the professional, peer reviewed reports is exactly like Friedemann's.[2]

After the grade of "F" was entered by defendants McCormick and Gutierrez, Friedemann appealed his grade to defendants Gilbert, Brajevich, Assar, Engs, Torro, Sprague and Smart. (Defendant Pima Community College Board of Governors is respondent superior.) These defendants unprofessionally ignored the facts or, they were incompetent to discern the facts when they upheld the grade. Friedemann submitted to each of the defendants (except Gutierrez) many scientific reports and articles about "therapeutic technique" and psychosomatic asthma [D92-M1, PR7 & PR8]. These defendants and a jury could compare Friedemann's PRs to the example PRs in the student syllabi (D92-PR5 & PR6; in EOR) and see that Friedemann's PRs far exceed the academic norm.[3]

According to the affidavit of defendant Gilbert, who taught at PCC for 10 years: ***Friedemann is the only student that flunked NRS 101 because of an "unsatisfactory" process recording!*** [D99-B,¶¶ 8&24] (This is a "deviation from the academic norm.")

Defendants McCormick, Gilbert and Gutierrez thought Friedemann was mentally ill [D92-G2, ¶¶1&3; X-3]. McCormick and Gilbert were afraid of Friedemann [D92-X3]. Discovery evidence showed that on three separate occasions, defendants Assar, Gilbert and McCormick called the campus police on Friedemann but they did not "press

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[2] Friedemann intended to introduce *The Cure Yourself of Asthma Book* as evidence at trial. Excerpts from this book were offered as evidence during Friedemann's administrative, academic/discrimination appeals prior to this lawsuit and were included in Plaintiff's "Separate Statement of Facts & Evidence." [D25-M1 & D92-TCYOAB]

[3] The "academic norms" are the two sample PRs from the student syllabi [D92-PR5 & PR6]

charges" or initiate disciplinary review. Friedemann disliked defendants McCormick, Gutierrez, Gilbert and Brajevich *and they knew he disliked them* [D92-M1A,p3; G2,p2; X2], [D91,¶¶8-10]! Friedemann was disliked by students in NRS 101 [D92-X1]. Thus, there is evidence for a jury to see McCormick, Gilbert, Gutierrez and Brajevich had ulterior motives for flunking Friedemann.

Friedemann sought money damages based on an amount he would have earned as a nurse.

Questions in the Court of Appeals. Friedemann raised the following issues in the Court of Appeals:

1. Judge Roll, the District Court Judge, abused his discretion by dismissing Friedemann's complaint.

2. Roll, in his Sept. 7 ORDER, weighs the evidence, determines the credibility of witnesses and essentially took the place of a jury, which is contrary to the law![4]

3. Friedemann is entitled to have a jury (not the judge) decide the following material issues of fact:

a. Was Friedemann arbitrarily and capriciously discriminated against?

b. Are Friedemann's PRs "satisfactory"? (If the jury finds the PRs are "satisfactory" then there was no academic reason for the defendants to flunk Friedemann.)

c. Did the defendants exercise professional judgment when they flunked Friedemann?

d. Did Defendants McCormick, Gutierrez and Gilbert flunk Friedemann because they thought Friedemann was mentally ill?

e. Do teachers at PCC have autocratic authority to teach 2 + 2 = 5, the sun revolves around a flat earth, man did not evolve from monkeys, asthma is psychosomatic, silicon

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[4] For instance, Roll weighs heavily in favor of defendant Gilbert's affidavit but Gilbert's credibility is damaged when she stated, "In over 30 years of nursing practice and teaching I have evaluated over 1000 process recordings.... Mr. Friedemann's re-written process recording for Terri McCormick was equal to the worst process recording I have been called upon to review." [D99-B,¶¶16-17] A jury can tell that Gilbert's statement is hyperbole by examining Friedemann's PR and comparing it the examples in the syllabi [D92-PR5,p47ff; PR6,p62ff; in EOR] and see that Friedemann's PRs are far better.

breast implants cause auto-immune (psychosomatic) disease, smoking cigarettes does not cause cancer, if you're "mentally ill" you're "not competent" to stand trial and flunk students who disagree?

f. Was there a rational basis for flunking Friedemann?

g. Do the grading policies for NRS 101, regarding the subjective, vague requirements for PRs [D92-PR5,pp47-48; PR6,pp62-63; in EOR] allow for arbitrary and capricious discrimination?

h. Did the defendants McCormick and Gutierrez deviate from academic norms when they flunked Friedemann?

Summary judgment against Friedemann was not proper. To defeat a summary judgment of a §1983 claim, plaintiff must prove with solid circumstantial evidence that the defendants had no rational basis for their decision (they were irrational); that their decision deviated from the academic norm, was motivated by bad faith or ill will or, that the defendants did not exercise professional judgment (they were incompetent). *Clements v. Nassau County,* 835 F.2d 1000 (2nd Cir. 1987); *Van De Zilver v. Rutgers University,* 971 F.Supp 925 (D.N.J. 1997); *Rossomando v. Bd. of Regents of Univ. of Nebraska,* 2 F.Supp.2d 1223 (D.Neb. 1988).

When the "state of mind" of the malicious, incompetent teachers is at issue, "summary judgment is unwarranted where solid circumstantial evidence exists to prove plaintiff's case." *Clements v. Nassau County,* 835 F2d 1000 (2nd Cir. 1987).

"Summary judgment procedure should be used sparingly so that no plaintiff having scintilla of merit to his cause should be denied his day in court." *Manok v. Southeast Dist. Bowling Ass'n,* D.C.Cal.1969, 306 F.Supp. 1215. See also, *Dawn v. Sterling Drug, Inc.,* D.C.Cal.1970, 319 F.Supp.358.

> It is not role of judge at summary judgment stage to weigh evidence or to evaluate its credibility, but rather to determine whether there is genuine issue for trial; in so doing, court must draw all inferences in light most favorable to non-moving party, and where non-moving party's evidence contradicts movant's, court must accept non-movant's version as true. *Alcman Services Corp. v.*

Samuel H. Bullock, P.C., D.N.J.1996, 925 F.Supp. 252, affirmed F.3rd 185.

Summary judgment is not chance for court to act as a jury and determine witness credibility, weigh evidence, or decide upon competing inferences. *Tenbrink v. Federal Home Loan Bank,* D.Kan.1996, 920 F.Supp. 1156.

Deviation from academic norms. According to *Hines v. Rinker,* 667 F2d 699, 701n.4 (1981), at the University of South Dakota School of Medicine, "failure in one category alone would not result in an F if the points given in other areas were high enough." And, according to *Regents of the U. of Michigan v. Ewing,* 106 S.Ct 507, the school of medicine at the University of Michigan considers the student's "entire academic career" before flunking the student. Thus, the defendants, by ignoring Friedemann's entire academic career, substantially deviated from the academic norms when they flunked Friedemann.

The evidence is overwhelming that the PRs are superb. If a jury/judge can decide the mental competency of a criminal and whether silicon breast implants can cause auto-immune (psychosomatic) disease, the jury/judge can surely tell if Friedemann's PR is better than the examples in the syllabi [D92-PR5 & PR6; in EOR] and is on par with the professionals cited in Friedemann's *The Cure Yourself of Asthma Book*.

District Court Proceedings. The District Court Judge abused his discretion by:

1. Denying plaintiff a jury trial.
2. Weighing the evidence.
3. Ignoring evidence.

a. School policy allows defendants to arbitrarily, maliciously and capriciously flunk straight-A students, under color of law.

b. Defendants were incompetent and did not exercise professional judgment when they flunked straight-A student for turning in superb process recording.

c. The defendants deviated from academic norm when they flunked straight-A student for turning in superb pro-

cess recording.

d. Some of the defendants were afraid of plaintiff; some thought he was mentally ill and some were motivated by ill will when they flunked plaintiff for turning in a superb PR.

e. A jury can see there was nothing wrong with plaintiff's PR — that the defendants were motivated by ill will or were incompetent and did not exercise professional judgment when they flunked straight-A student.

Roll cites *Ewing* (474 U.S. 214) as the basis for dismissing Friedemann's Complaint, yet *Ewing* is dissimilar from Friedemann because Ewing had an "unenviable academic record" (at 227) and "received the lowest score recorded by an Interflex student in the brief history of that program." (at 216) whereas Friedemann was a straight-A student who would have received a B in NRS if not for the "unsatisfactory" PR.

Roll, citing *Ewing*, wrote:

> Federal courts are not the proper place to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." Id. at 226 (citation omitted).

Yet federal courts allow juries to evaluate cumulative, scientific evidence in cases involving asbestos, silicone breast implants, disease caused by tobacco, evolution.

It doesn't take an expert to see that Friedemann's PR is superb and there was no academic reason to flunk Friedemann. The jury could compare Friedemann's PR to the sample PRs in the syllabus [D92/PR5 and PR6] or the professional reports in journals [D92/TCYOAB] and see there was no academic reason for flunking Friedemann.

Court of Appeals Decision. The Court of Appeals, relying entirely on page 225 of *Ewing*, and being afraid to rule against the Supreme Court in *Ewing*, denied Friedemann's appeal: "The district court properly granted summary judgment in favor of the defendants because the record does not compel the conclusion that the defendants

acted arbitrarily in their academic decision. *See Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 225 (1985)."

The Court of Appeals ignored the evidence too — denying Friedemann his "day in court" *before a jury*.

REASONS FOR GRANTING THE PETITION

If the decision of the lower court is allowed to stand:

1. Schools in America could flunk and suppress heretics and punish students they hate, fear and believe are mentally ill by flunking them.

2. Autocratic schools could adopt subjective, vague standards for flunking students and then arbitrarily and capriciously flunk straight-A students under the color of academic legitimacy.

The conflicting standards for granting summary judgment held to and applied by this Court in *Ewing* discriminate against students by being more stringent than standards applied in disputes over scientific findings: A jury can decide scientific findings of fact where there is a "scintilla of evidence" but a jury can not find a student was flunked for non-academic reasons where there is a "scintilla of evidence" proving there was no academic, legitimate reason for flunking straight-A student.

All of the published cases similar to Friedemann's are negative, denying incompetent students their "day in court." Friedemann is a straight-A student who deserves his "day in court" to prove his competency.

CONCLUSION

Granting Friedemann Certiorari will provide heretical, cranky students throughout America, a positive hope that malicious, autocratic, incompetent teachers and staff will have to face a jury.

RESPECTFULLY SUBMITTED February 14, 2001 by,

Bruce A. Friedemann

Bruce A. Friedemann

APPENDIX

U.S. Court of Appeals for the Ninth Circuit
Filed Nov 17 2000

ORDER No. 99-17315

Before: FERGUSON, RYMER, and HAWKINS, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing. Judges Rymer and Hawkins vote to deny the petition for rehearing en banc, and Judge Ferguson so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App.P. 35

The petition for panel rehearing and the petition for rehearing en banc are denied. No further filings shall be accepted in this closed appeal.

U.S. Court of Appeals for the Ninth Circuit
Filed July 13 2000

MEMORANDUM No. 99-17315

Appeal from the United States District Court for the District of Arizona
John M. Roll, District Judge, Presiding
Submitted June 26, 2000
Before: FERGUSON, RYMER, and HAWKINS, Circuit Judges.

Bruce A. Friedemann appeals pro se the district court's summary judgment in favor of the defendants in his 42 U.S.C. § 1983 action alleging that he was improperly dismissed from a nursing program at Pima Community College. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a grant of summary judgment, *see Goehring v. Brophy,* 94 F.3d 1294, 1298 (9th Cir. 1996), and we affirm.

The district court properly granted summary judgment in favor of the defendants because the record does not compel the conclusion that the defendants acted arbitrarily in their academic decision. *See Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 225 (1985).

Friedemann concedes that he is not pursuing his 42 U.S.C §§ 1985, 1986 or ADA claims on appeal.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA (Tucson)

(CIVIL ORDER – GENERAL) CV-97-00289-JMR
Filed Sep 27 1999

On September 2, 1999, the Court granted Defendants' motion for summary judgment and dismissed this action. Thereafter, on September 21, 1999, Plaintiff filed a motion styled as "Plaintiff's Motion for a Rehearing – To Amend Summary Judgment." Plaintiff argues that the Court erred in granting Defendants' motion for summary judgment because "there is plenty of evidence for a jury to decide if there was a rational basis for flunking plaintiff and if the defendants exercised professional judgment when they flunked plaintiff."

Plaintiff fails, however, to offer any new evidence or argument regarding Defendants' motion. After reviewing Plaintiff's Motion for a Rehearing and the Court's September 2, 1999 order, the Court determines that it properly granted Defendants' motion for summary judgment. Plaintiff did not offer evidence from which a reasonable jury could conclude that Defendants acted in an unconstitutional manner.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for a Rehearing – To Amend Summary Judgment is **DENIED.**

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA (Tucson)

ORDER CV-97-00289-JMR
Filed Sept 7 1999

Pending before the Court is Defendants' Motion for Summary Judgment. For the reasons set forth below, Defendants' motion is granted.

BACKGROUND

Plaintiff was a nursing student at Pima Community College until he was disqualified from the Nursing Program

because he received a failing grade in Nursing 101. In 1996, Defendant Lupe Gutierrez, an instructor in the Nursing Program, recommended failing Plaintiff in his first semester. However, after consulting with Defendant Joan Gilbert, the Nursing Director, she reversed her decision and allowed Plaintiff to return for another semester.

During the new semester in Spring 1996, Defendant McCormick, Plaintiff's clinical instructor, failed him for submitting a substandard process recording (PR).[1] Although Plaintiff's first PR was allegedly substandard, Defendant McCormick gave Plaintiff the opportunity to resubmit it. She spent at least one hour with Plaintiff instructing him on improving the PR, and even provided him with her home phone number should he have any further questions. However, Defendant McCormick found the resubmitted PR to be unsatisfactory and gave Plaintiff a failing grade for Nursing 101.

On April 30, 1997, Plaintiff filed a complaint against various Defendants, including the Community College Board and the Nursing Board, Claiming that Defendants failed him because of his religious and political views. Plaintiff's Third Amended Complaint asserts that the Court has jurisdiction under 42 U.S.C. §§ 1983 (civil rights violation), 1985 (conspiracy), 1986 (failure to prevent conspiracy), 12132 (Americans with Disabilities Act), the First Amendment and the Fourteenth Amendment.

On July 20, 1998, defendants Community College Board and Nursing Board filed motions to dismiss, which the Court granted. On June 14, 1999, the remaining Defendants filed a motion for summary judgment. In his Response to Defen-

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1. The purpose of the process recording is to assist the student to effectively communicate and interact with patients. (Exhibit B, Defendants' Supplemental Separate Statement of Facts, at 3). The process recording should include the dialog between the student and the patient. (Id.). Then, the student is required to complete an analysis to determine which techniques were effective and haw the student could improve his techniques. (Id.). Process recordings are graded on a satisfactory or unsatisfactory basis. (Id.) Students are informed at the initial orientation that an unsatisfactory rating on one's process recording results in failure of he class. (Id.)

dants' Motion for Summary Judgment, Plaintiff concedes that his §§ 1985 and 1986 claims are properly dismissed.

ANALYSIS

Section 1983

To sustain a claim for relief under section 1983, Plaintiff must prove two elements: (1) Defendants acted under color of state law; and (2) Defendants deprived him of a right secured by the Constitution and laws of the United States. See Johnson v. Knowles, 113 F.3d 1114, 117 (9th Cir. 1997). In this case, Defendants assert that Plaintiff has failed to produce evidence which would demonstrate that plaintiff was deprived of a federally protected right.

"In cases involving academic dismissal, educational institutions have the right to receive summary judgment unless there is evidence from which a jury could conclude that there was no rational basis for the decision or that it was motivated by bad faith or ill will unrelated to academic performance." Clements v. County of Nassau, 835 F.2d 1000, 1004 (2d Cir. 1987). Furthermore, the Supreme Court has stated that courts should "show great respect for the faculty's professional judgment" and should not "override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Regents of the Univ. Of Michigan v. Ewing, 474 U.S. 214, 224 (1985).

Defendant Gilbert, the Director of the Nursing Program during the time period relevant to this action, states in her affidavit that Plaintiff's PR "simply did not meet the criteria and was unsatisfactory." (Exhibit B, Defendants' Supplemental Statements of Facts, at 3). She also states that Plaintiff's PR "was equal to the worst process recording I have been called upon to review." (Id.) In addition to having been the Director of the Nursing Program, Defendant Gilbert possesses a Masters of Arts degree in education and psychiatric mental health nursing from New York University, where she is currently a Ph.D candidate. She has been in nursing education for over 30 years and has taught many nursing courses.

a. Rational Basis for Defendants' Decision

Plaintiff argues at length that a failure to return appropriate PRs should not result in failure of the entire class. He also argues that his unsatisfactory grade for his PR was motivated by his instructors' beliefs that his views on asthma and patient-nurse communication were unorthodox and unproductive. Plaintiff argues that "the jury can decide if the defendants and their therapeutic conversational technique are scientific" and notes that "Plaintiff studied linguistics ... and thus gleaned his own theories about effective conversation." (Plaintiff's Response to Defendant's Motion for Summary Judgment, at 6).

In sum, it is Plaintiff's contention that Defendants' techniques for treating and communicating with patients are unscientific, whereas he has developed the correct manner to treat and communicate with patients. Because of the correctness of his own theories, and the flaws of Defendants' views, Plaintiff apparently asserts that Defendants violated his constitutional rights be evaluating him pursuant to their criteria, instead of adopting his own.

Plaintiff asks the Court to do precisely what the deferential standard the Supreme Court articulated in Ewing prevents it from doing. Although Plaintiff offers excerpts from one book challenging the accepted views on treating asthma, he has failed to demonstrate that Defendants treatment methods were "a substantial departure from accepted academic norms." Ewing, 474 U.S. at 224. Rather, he implies that Defendants violated his constitutional rights by evaluating him by the accepted views of the medical community, rather than adopting his view that asthma is simply psychosomatic and his communication methods which he developed by studying linguistics.[2]

Federal courts are not the proper place to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require an expert evaluation of

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[2] Plaintiff fails to identify the nature of his alleged study of linguistics. He offers no evidence that he has received formal training in linguistics, or received any degree in the study of linguistics.

cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." Id. at 226 (citation omitted). Accordingly, Plaintiff has failed to show that a reasonable jury could find that there was not a rational basis for Defendants' decision.

b. Plaintiff's Allegations of Bad Faith

There is also no evidence that Defendants's evaluation of Plaintiff was motivated by bad faith. Although Plaintiff argues that there are several possible examples of bad faith, he fails to offer substantive evidence in support of his allegations. For example, Plaintiff states that he "instinctively knew Defendant McCormick was a "man-hater."" (Plaintiff's Response to Defendants' Motion for Summary Judgment, at 8). Plaintiff also implies the presence of gender discrimination by noting that the [sample] PR [in the syllabus] is "touchy-feely" and that "males aren't touchy-feely." Plaintiff fails to establish any basis upon which a jury could find that Defendants failed Plaintiff because of gender discrimination.

Plaintiff also seems to allege that Defendant Gutierrez was hostile towards him because of bad faith. The only evidence Plaintiff offers to support his assertions is his perception that Defendant Gutierrez was concerned with Plaintiff's attitude and treatment of elderly patients. However, Defendant Gutierrez's concerns with Plaintiff's attitude and treatment of patients do not manifest a bad faith attempt to harm Plaintiff's academic career. Moreover, there is no evidence that Defendant Gutierrez played any role in Plaintiff's failing grade. Therefore, Plaintiff has offered no evidence supporting his contention that defendants acted with bad faith.

ADA

To state a cause of action under the ADA, Plaintiff must allege:

> (1) he is a "qualified individual with a disability;" (2) he was either excluded from participation in or denied the benefits of a public entity's services, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits or discrimina-

tion was by reason of his disability. Weinreich v. Los Angles County Metro. Transp. Auth., 114 F.3d 876, 978 (9th Cir.), cert. denied, 118 S.Ct. 423 (1997).

Plaintiff's Third Amended Complaint asserts that various Defendants "neglected to comply with the Americans with Disabilities Act (42 USC 12132) when notified by plaintiff that he has difficulty communicating (i.e., plaintiff dislikes chatting)." (Third Amended Complaint, at ¶ 9). In its November 4, 1998 order, the Court determined that Plaintiff's dislike of chatting was not a disability. Therefore, Plaintiff's ADA claim is properly dismissed.

Accordingly,

IT IS ORDERED that Defendants' Motion for Summary Judgment is **GRANTED** and this action is **DISMISSED** with **PREJUDICE.**

IT IS FURTHER ORDERED that Plaintiff's Motion for Sanctions, filed July 29, 1999, is **DENIED**.